



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 22 OF 2017**

**LAWRENCE NDIRANGU WAHOME.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**KENYA INDUSTRIAL ESTATES LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**VIEWLINE AUCTIONEERS..... 2<sup>ND</sup>DEFENDANT /RESPONDENT**

**RULING**

1. By a plaint dated **14<sup>th</sup> February, 2017** and filed on the same day, the plaintiff herein, **Lawrence Ndirangu Wahome**, hereinafter referred to as “the applicant”, filed the suit herein seeking to permanently restrain the defendants (Kenya Industrial Estates Limited and ViewLine auctioneers) from selling or in any other way alienating the parcel of land known as **Mweiga Block III/308**, hereinafter referred to as “the suit property”.

2. Simultaneously with the plaint, the applicant filed chamber summons of even date seeking the following orders:

(i)..... spent.

(ii) ..... spent.

(iii) A temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants their agents from selling alienating and/or disposing off the suit property pending the hearing and determination of the suit;

(v) Costs of the application be provided for.

3. The application is premised on the grounds that the defendants have advertised the suit property; that the 1<sup>st</sup> defendant (Kenya Industrial Estates Limited) has not issued the plaintiff with mandatory statutory notice; that the plaintiff had not been made aware that the principal debtor had defaulted in payment and that the plaintiff will suffer irreparable loss and damage unless the orders sought are granted as sale of the suit property would render him homeless.

4. The application is supported by the affidavit of the applicant sworn on **14<sup>th</sup> February, 2014** in which the applicant has deponed as follows:

(a) That in 2014, he provided the title to the suit property to Dedan Ngunjiri Ndiritu to use as a

security for a loan Dedan Ngunjiri Ndiritu wanted to obtain from the 1<sup>st</sup> defendant;

(b) That the loan was for Kshs.490,000/= and was repayable by equal monthly installments of Kshs.23,760/=;

(c) That on or about 9<sup>th</sup> February, 2017 he was informed by his friend that the suit property had been advertised for sale through public auction vide the Daily Nation edition of 30<sup>th</sup> January, 2017;

(d) That he searched for the said newspaper advertisement and confirmed that the suit property had indeed been advertised for sale by public auction.

5. Maintaining that he was not aware of the intended auction, he explains that he immediately contacted the principal debtor, Dedan Ngunjiri Nderitu, who informed him that he had made payments amounting to Kshs. 306,000/=.

6. On the strength of the payments made by the principal debtor, the plaintiff contends that it is just to restrain the defendants from undertaking the intended sale.

7. Annexed to the applicant's affidavit is the letter of offer dated 4<sup>th</sup> November, 2014 from the 1<sup>st</sup> defendant to the principal debtor and copied to the applicant. The letter informs the principal debtor and the applicant about disbursement of the loan to the principal debtor and the loan terms/conditions, a copy of the newspaper page bearing the advertisement, a copy of the 1<sup>st</sup> defendant's slip showing the amount advanced to the principal debtor and a bundle of documents showing the payments made by the principal debtor.

8. In reply and opposition to the application, the regional manager of the 1<sup>st</sup> defendant, Francis Kabuga, swore the affidavit filed on **10<sup>th</sup> March, 2017** in which he deponed that the applicant offered to be a guarantor to the principal debtor using the suit property; that the suit property was charged and the security perfected; that the principal debtor has defaulted in repayment of the loan and that the outstanding loan balance as at the time he swore his affidavit was Kshs.356,899/=.

9. Concerning the applicant's contention that he was not served with mandatory statutory notices, he deponed that he is aware that the applicant and principal debtor were issued with various demand letters by the 1<sup>st</sup> defendant-he deposes that he personally prepared and delivered those demand letters. He is also aware that a statutory notice was issued on 6<sup>th</sup> April, 2016 which he personally delivered to the principal debtor and the applicant. The principal debtor and the applicant are said to have acknowledged receipt of the statutory notice by signing the delivery book.

10. He is also aware that on instructions of 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant issued the requisite auctioneers redemption notice and notification of sale to the principal debtor and the applicant. Service of the said notices on the principal debtor and the applicant is said to have been effected personally on the principal debtor and by registered post on the applicant.

11. In view of the foregoing, the applicant is said to be guilty of deliberate concealment and none disclosure of material facts.

12. It is acknowledged that on 30<sup>th</sup> January, 2017 the 2<sup>nd</sup> defendant advertised the suit property for sale by public auction.

13. Concerning the applicant's contention that he was not aware of the intended sale of the suit property, the said averment is said to be untrue because all processes were done above board and in compliance with statutory requirements.

14. It is further deposed that the property was valued to ascertain its value.

15. Maintaining that the principal debtor has defaulted in loan repayment, it is contended that the 1<sup>st</sup> respondent has to enforce its interest in the suit property as it is the security that was given by the principal debtor and the applicant.

16. In support of the averments contained in the replying affidavit the deponent of the replying affidavit has annexed to the affidavit the following documents:

(a) Copies of charge and deed of guarantee both dated 3<sup>rd</sup> November, 2011, marked **FK-1**;

(b) Copy of loan statement, marked **FK-2**;

(c) Copies of demand letters, marked **FK-3 (a) to (c)**;

(d) Copies of statutory notices, delivery book and affidavit of service, marked **FK-4 (a)(i) and ii; FK(b)(i) and (ii) and 4 (c)** respectively;

(e) Copies of redemption notice, notification of sale and affidavit of service in respect thereof marked **FK-5(a), FK-5(b); FK-5(c) and FK-5(d)** respectively;

(f) Copy of valuation report, marked **FK-6**.

(g) Copy of the daily nation page where the auction was advertised, marked **FK- 7**.

17. Whilst the replying affidavit herein raises serious issues concerning the truth of the applicant's contention that he was not served with statutorily notices and despite the applicant having been given an opportunity to file a further affidavit, if need be, I note that no further affidavit was filed either to deny or controvert the documentary evidence annexed to the affidavit sworn in opposition of the application herein. The said documentary evidence when read alongside the uncontroverted averments of the deponent of the replying affidavit shows that the applicant was served with the requisite statutory notices both personally and by registered mail. In that regard see the documents **FK-4 (a)(i) and ii; FK(b)(i) and (ii); 4 (c) and FK-5(a), FK-5(b); FK-5(c) and FK-5(d)**.

18. A review of the terms of the charge and deed of guarantee executed between the applicant and the 1<sup>st</sup> defendant shows that the 1<sup>st</sup> defendant could enforce its right under the charge directly upon the applicant provided that circumstances had arisen warranting exercise of that right by the charge.

19. The evidence adduced in this matter shows that the principal-debtor defaulted in his loan repayment obligation leading to issuance of demand letters to him to meet his obligations to the chargee.

20. Apparently, the principal borrower persisted in his failure to meet his contractual obligations leading to issuance of statutory notices both on the principal-debtor and the applicant herein who had guaranteed the principal debtor using title to the suit property.

#### **The law applicable to the application:-**

21. The law applicable was stated by **Ouko J.**, (as he then was in the case of **Patrick Karimi Wairagu t/a Thigi General Stores vs. Barclays Bank of Kenya Ltd & Another**; Nakuru HCCC NO. 93 of 2011 thus:-

**“The onus at this stage, is upon the Applicant to persuade the court that upon the facts he has relied on and on the application of the law, he has a *prima facie* case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience is in his favour. See Giella V. Cassman Brown & Company Limited (1973) E.A 358.**

Starting with the second last principle, the answer was provided by the Court of Appeal in Nyanza Fish Processors Ltd. V Barclays Bank of Kenya Civil Appeal NO. 114 of 2009 where the Judges said;

“If the property, the subject matter of this litigation is sold, the loss to the Applicant will be financial. True, it may be the property is unique. Its value however is ascertainable... The Applicant itself had offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the Applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the Applicant to damages. The Respondent is a bank and there is no gain saying that it will be able to satisfy the loss...”

That is the situation the present Applicant finds himself. On the balance of convenience, the Applicant has not rebutted the assertion by the 1<sup>st</sup> Respondent that the last payment was on 29<sup>th</sup> June 2004, some seven years ago and only Kshs.161,667/= was paid and the outstanding unpaid balance is a whopping Kshs.151,980,772.23/=. This amount will continue to escalate to the detriment of the Respondent.

Turning to the question of *prima facie* case, the question must be determined without going to the merit of the Applicant's suit. The Applicant has in the first place argued that the interest charged was outrageous and unascertainable. The answer to such a claim was provided in the case of Joseph Okoth Wando V National Bank of Kenya Civil Appeal No. 77 of 2004, where the law was stated as follows;

“It is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute”

#### Analysis and determination:-

22. In applying the above principles to the circumstances of this case, whilst the applicant has averred that he stands to suffer irreparable loss and detriment unless the orders are sought, having offered his property as security to guarantee the loan granted to the principal debtor by the 1<sup>st</sup> defendant, he cannot be heard to say that if the property is sold to meet the purpose for which it was given he would suffer irreparable loss. If such argument were to be sustained, it would defeat the object for which the security was sought and obtained. For that reason, and in accordance with decision of the Court of Appeal in the case of **Nyanza Fish Processors Limited Vs Barclays Bank of Kenya** *supra*, I find and hold that, the loss and damage if any, that the applicant may suffer owing to denial of the orders sought, is compensable by way of damages.

23. On whether the applicant has established a *prima facie* case with probability of success at trial, having determined that the evidence on record shows that the principal debtor breached his obligation under the charge and that the applicant has not controverted the evidence tendered by the defendants showing that the law was complied with in trying to realize the charged property, I returned a negative verdict to that issue.

24. There being no evidence that the principal-debtor is meeting his obligation under the charge document, I find that the balance of convenience tilts in favour of the 1<sup>st</sup> respondent whose right to realize the charge instrument has, under the charge instrument accrued.

25. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the defendants/respondents.

**Dated, signed and delivered in open court at Nyeri this 17<sup>th</sup> day of October, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Gichuku h/b for Mr. Muhoho for plaintiff/applicant

N/A for defendants/respondents

Court assistant - Esther